

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Winstar Communications, LLC)	
Emergency Petition for Declaratory)	WC Docket No. 02-80
Ruling Regarding ILEC Obligations)	
To Continue Providing Services)	

COMMENTS OF QWEST CORPORATION IN RESPONSE
TO THE EMERGENCY PETITION FOR DECLARATORY
RULING OF WINSTAR COMMUNICATIONS, LLC

QWEST CORPORATION

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I. INTRODUCTION AND SUMMARY

Qwest Corporation (“Qwest”) hereby submits its Comments in Response to the Emergency Petition for Declaratory Ruling of Winstar Communications, LLC (“New Winstar”). New Winstar’s Petition fails to present facts or arguments justifying the relief it seeks under the Communications Act. Indeed, New Winstar and its parent company, IDT Winstar Holdings, LLC (collectively “IDT”) fill their Petition with accusatory rhetoric and allegations against Qwest and the other Regional Bell Operating Companies (“RBOC”).¹ IDT’s tone is an attempt to mask its real agenda: to avoid the careful balancing of interests contained in the bankruptcy laws.

There is no merit to IDT’s claims that customer interests will be jeopardized without the extraordinary relief sought by the Petition. Normal bankruptcy processes, which IDT ignores, are available to minimize or avoid customer disruption without infringing on the legally

¹ See *Public Notice, Wireline Competition Bureau Seeks Comment on Winstar Communications, LLC’s Emergency Petition for Declaratory Ruling Requesting the Commission to Require the ILECs to Provide a Seamless Transition of Service to Customers*, WC Docket No. 02-80, DA 02-924, rel. Apr. 19, 2002.

protected interest of creditors under federal bankruptcy statutes. Indeed, any risk to customers is a function of IDT's own conduct, including its failure to provide timely and adequate notice to customers.

Specifically, IDT, purchased the assets of bankrupt Winstar Communications, Inc. ("Old Winstar"), competitive local exchange carrier ("CLEC"), and now demands the benefits of the Old Winstar service contracts without assuming and curing the past debt owed on those contracts *as required by law*. IDT's actions have been carefully orchestrated to migrate Old Winstar customers onto its purchased network under terms that disregard the bankruptcy laws, as well as Qwest's Tariff provisions and operational processes. IDT apparently believes that by purposefully failing to notify customers of a possible disruption in service, the Commission will reward it by preventing Qwest and the other carriers from following their procedures and attempting to exercise their rights under the law. Even if the relief sought by IDT were permitted by the Communications Act and Bankruptcy statutes, IDT should not be permitted to exploit a situation for which it alone is responsible.

IDT stands in sharp contrast to other providers -- its competitors -- who have purchased assets out of bankruptcy. At the same time as the Winstar bankruptcy unfolded in 2001, the assets of CLECs Rhythms Netconnections and Northpoint Communications Group were purchased by MCI WorldCom and AT&T respectively. In both cases, the transfer of service occurred without disruption because the buyers followed the law and assumed the contracts under which they wished to continue providing service. WorldCom and AT&T understood that, to the extent they purchased end-user accounts out of bankruptcy and wished to ensure minimal customer impact, bankruptcy laws required them to assume and cure those wholesale contracts for the facilities and services necessary for that result. These carriers recognized that in order to

be treated as the assignees of particular contract rights of the bankrupt, they had to actually assume such contracts. That is the balance struck in the bankruptcy laws from which IDT seeks an exemption.

In short, the situation of which IDT complains is of its own making for refusing to adhere to the rules under which a seamless transfer of service can and does regularly occur. Qwest has not violated any Telecommunications Act provision by treating IDT the same as other parties purchasing assets out of bankruptcy. IDT's Petition should be denied.

II. BACKGROUND

A. Bankruptcy Proceedings

On April 18, 2001, Winstar Communications, Inc. and certain subsidiaries and affiliates ("Old Winstar") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.² At the time it filed for bankruptcy, Old Winstar owed Qwest approximately \$ 1.6 million³ for regulated wholesale telecommunications services and facilities provided under service contracts and interconnection agreements for operations in the 14-state region where Qwest is the incumbent local exchange carrier ("ILEC").

As a matter of statute, utilities are not required to provide service to a company in bankruptcy unless they receive payment under a so-called "adequate assurances" agreement.⁴ In

² *In re Winstar Communications, Inc., et al. Debtors*, U.S. Bankruptcy Court for the District of Delaware, Chapter 11, Case No. 01-01430(JJF) ("*In re Winstar*").

³ Old Winstar also owed Qwest approximately \$650,000 for regulated retail services.

⁴ Under 11 U.S.C. § 366, utilities are required to continue to provide services to a debtor for the first 20 days of a bankruptcy case and, thereafter, so long as the debtor provides the utility with adequate assurance of future payment. "Adequate assurance" may include a cash deposit, prepayment of estimated charges, or an agreement that the utility may stop providing services with limited notice and without court approval if the debtor fails to make prompt payment. On September 28, 2001, the Bankruptcy Court entered a Stipulation and Order approving an

this unusual case, however, Qwest and the other RBOCs, interexchange carriers (“IXC”) and CLECs who were creditors (“service providers”) were enjoined from altering, refusing or discontinuing utility services to Old Winstar despite not receiving “adequate assurance” payments under the agreements entered into between the parties and adopted by stipulation as Court orders. By November 2001, Old Winstar advised the Court that it did not have sufficient funds to continue operations and needed to sell its CLEC business.

Qwest is due \$3.8 million in past due amounts for payments not received under the post-bankruptcy “adequate assurance” agreement, in addition to the \$1.6 million due for pre-bankruptcy services rendered to Old Winstar. Thus, wholesale carriers like Qwest were left holding the bag for Old Winstar’s failure to follow normal bankruptcy processes, and for not notifying its customers that service might be disrupted or terminated due to its declining financial position and failure to pay its wholesale vendors.⁵

IDT Winstar Acquisition, Inc. (later succeeded by IDT Winstar Holdings, LLC) (“IDT”), a company unaffiliated with Old Winstar despite its name, emerged as the only viable purchaser of Old Winstar’s CLEC operation. Consequently, on December 19, 2001, the Bankruptcy Court entered an order authorizing the sale of substantially all of Old Winstar’s assets to IDT (“Sale

“adequate assurance” agreement reached between Old Winstar and Qwest, allowing Qwest certain remedies and rights if payments were not made, including the right to terminate service.

⁵ At a December 10, 2001 hearing, the FCC notified the Court that it had met with Old Winstar and learned that it had not yet filed a Section 214 application for discontinuance of service, but that “they are working on it.” *In re Winstar*, Transcript of Hearing of December 10, 2001 at p. 47 (“December 10th Hearing Transcript”), attached hereto as Exhibit 1. In fact, Old Winstar did not notify its customers of a discontinuance of service until March 15, 2002. *See Public Notice*, DA-02-650, rel. Mar. 18, 2002. On Apr. 18, 2002, the FCC granted Old Winstar’s application to discontinue service to its customers. *See In the Matter of Winstar Wireless, Inc. Application to Discontinue Domestic and International Services, Order*, DA 02-911, rel. Apr. 18, 2002.

Order”).⁶ Pursuant to the Court’s Sale Order, IDT agreed to fund and conduct Old Winstar’s operations during a transition period of 120 days while it sought to obtain FCC and state regulatory licenses. As part of the Sale Order, IDT was required to pre-pay for all current charges owed under the Qwest service and interconnection agreements.⁷ The Sale Order also required IDT, within the 120-day transition period, to either assume or reject any executory contract or unexpired lease to which Old Winstar was a party.⁸ With respect to any executory contract which IDT chose to assume, IDT was required to cure any payments due under the assumption and assignment agreements.⁹ At the December 19, 2001 hearing held to approve the sale, IDT admitted to the Court that as to those lines IDT wants to keep, “we have to cure the past due in order to keep, you know, the contract past 120 days”¹⁰ IDT’s own acknowledgment indicated to Qwest that IDT understood that, like WorldCom and AT&T, it was

⁶ The Bankruptcy Court’s December 19, 2001 Sale Order (Order Authorizing (i) Sale of Certain of the Debtors’ Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (ii) Approving Cure Amounts with Respect to Certain Executory Contracts and Unexpired Leases, (iii) Authorizing the Debtors to Enter into and Approving Management Agreement, (iv) Approving Regulatory Transition Process and (v) Granting Related Relief), is attached as Exhibit 3 to IDT’s Emergency Petition, and as Exhibit A to Qwest’s Motion to Withdraw Application, *see* note 19 *infra*, submitted with the instant Response as Exhibit 2.

⁷ Sale Order at 18-19. Instead of allowing Qwest and the other service providers to enforce the adequate assurances agreements under which they could terminate service for lack of payment, IDT was required to deposit \$60 million into an account to provide for the payment of future services to be provided during the 120-day evaluation period. *Id.* at pp. 10.

⁸ Under bankruptcy law, if an executory contract is not assumed within the required period, it is deemed rejected by operation of law. *See* 11 U.S.C. § 365.

⁹ Sale Order at pp. 18-19. The Bankruptcy Code allows a debtor to assign a contract if the debtor or the assignee cures all defaults under the contract. Unless the non-debtor party to a contract consents to some other treatment, the debtor or assignee must pay all pre-petition and post-petition amounts in cash as part of the cure. *See* 11 U.S.C. § 365(b).

¹⁰ *In re Winstar*, Transcript of Hearing held Dec. 19, 2001, at p. 249 and pp. 246-253, attached hereto as Exhibit 3.

required to assume and cure the debt to the extent that IDT intended to continue to service particular customers.

In January 2002, the Bankruptcy Court converted the proceedings from Chapter 11 to a liquidation under Chapter 7 of the Bankruptcy Code.¹¹ During the 120-day period mandated by the Bankruptcy Court, IDT took no action to assume or reject any of Qwest's contracts with Old Winstar. Instead, at the eleventh hour, IDT directed that the Chapter 7 Trustee seek additional time to assume or reject contracts. On April 19, 2002, the Bankruptcy Court: (i) denied the Trustee an extension of time to assume or reject executory contracts on behalf of IDT; (ii) required IDT to identify any agreement it wished to assume by April 18, 2002; (iii) deemed "rejected" any agreement not so identified; and (iv) authorized the service providers to terminate¹² services provided under the rejected contracts as of midnight, April 18, 2002.¹³ Dissatisfied with the requirements imposed by the Bankruptcy Court, IDT sought and obtained a temporary injunction from the United States District Court for the District of Delaware, preventing the service providers, including Qwest, from terminating their contracts until such time as the Bankruptcy Court Judge could hear IDT's request for a stay pending appeal.¹⁴

¹¹ Pursuant to Section 365 of the Bankruptcy Code, 11 U.S.C. § 365(d), the Chapter 7 Trustee may assume or reject any executory contracts on behalf of IDT.

¹² Under 11 U.S.C. § 365(g), rejection of the debtor's executory contract constitutes a breach of the contract. Because IDT's rejection constitutes a material breach of the contracts, Qwest, as the non-breaching party, is relieved of performance under the contracts. *See In re Winstar*, Objection of Qwest Corporation to the Motion of Winstar Holdings LLC to Enforce Injunction Against Stopping Services to Debtors Before Cutoff Date (and cases cited therein at p. 5), attached hereto as Exhibit 4.

¹³ *See In re Winstar*, Order on Trustee's Motion for an Extension of Time to Assume or Reject Executory Contracts and Leases, and Order Denying Motion of Winstar Holdings, LLC to Enforce Injunction Against Stopping Services to Debtors Before the Cutoff Date, dated Apr. 19, 2002, attached hereto as Composite Exhibit 5.

¹⁴ *See Winstar Holdings, LLC v. Verizon Communications, Inc., et al.*, U.S. District Court for the District of Delaware, C.A. No. 02-284, Order of Apr. 22, 2002, attached hereto as Exhibit 6. On

Qwest is owed approximately \$5.4 million for pre- and post-petition services. Qwest recognizes that, to the extent IDT rejects the contracts, Qwest will not receive payment, including sums owed for post-petition breaches of the adequate assurance agreements. However, to the extent that IDT wants the benefits of the Old Winstar contracts,¹⁵ it could assume and cure as WorldCom and AT&T did before them.

B. IDT's Efforts to Operate under Old Winstar's Contracts Without Assumption

In December 2001, IDT closed on the purchase of Old Winstar's assets and formed a subsidiary to operate the business, naming it 'Winstar Communications, LLC' ("New Winstar"). Despite its name, New Winstar has no corporate affiliation to Old Winstar, save for being the non-debtor purchaser of Old Winstar's assets. Using its "Winstar" name, IDT is making every effort to continue to operate under Old Winstar's contracts without assumption and cure of those existing contracts in violation of bankruptcy law and the Court's Sale Order.

During the bankruptcy proceedings, IDT made the affirmative decision not to assume Old Winstar's contracts, with full knowledge that such contracts would be deemed rejected after 120 days and the service providers would be free from their contract obligation to provide service. In order to actually disconnect service, however, a carrier needs authorization from the FCC under Section 214 of the Communications Act, 47 U.S.C. § 214, and as a precursor, a carrier must provide notice to its customers under FCC Rules, 47 C.F.R. § 63.71.¹⁶ IDT, however, did not

Apr. 26, 2002, the Bankruptcy Court maintained the temporary injunction and set a briefing schedule for IDT's motion for stay pending appeal. A copy of the Apr. 26, 2002 Memorandum Order is attached as Exhibit 7.

¹⁵ The benefits include such things as a discounted price for services under Qwest's Regional Commitment Plan when committing to a certain volume threshold.

¹⁶ Section 63.71 provides that a domestic carrier seeking to discontinue, reduce or impair service, "shall notify [each affected customer in writing] of the planned discontinuance, reduction, or impairment of service and shall notify and submit a copy of its application" to the affected States and public utility commissions, unless the FCC authorizes another form of notice for good cause

notify its customers of any potential future disruption in service during the 120-day period or upon its expiration on April 19, 2002.¹⁷ Rather than providing a notice of discontinuance of service, IDT and New Winstar notified certain Old Winstar customers (those it is choosing to keep) of a change in carrier to comply with the slamming prohibitions of Section 258 of the Act, and Part 64 of the FCC's Rules.¹⁸ This notice effectively represented to those customers (and the FCC) that IDT would be prepared to service those accounts – a representation that depended on IDT assuming and curing the relevant Old Winstar contracts.

IDT has instead attempted an end run around the Bankruptcy Code provisions requiring past debts to be cured in order to assume executory contracts and has created by its own failure to comply with the Commission's rules a situation for which it now seeks the Commission to grant it an exemption from bankruptcy law and Qwest's Tariff. IDT approached Qwest to enter into new interconnection agreements using the name of its newly-created company "Winstar Communications, LLC" (New Winstar), without any mention of the Bankruptcy Court orders and assumption obligations. By letter dated January 29, 2002, New Winstar wrote to Qwest's Wholesale Division seeking to opt-in to the interconnection agreement between Sprint Communications Company LLP and Qwest.¹⁹ Because Qwest continued to provide service

shown. 47 C.F.R. § 63.71(a). Once the carrier files an application with the FCC requesting discontinuance of service, the FCC may grant the request after 30 days. 47 C.F.R. § 63.71(b).

¹⁷ At a Dec. 10, 2001 hearing before the Bankruptcy Court that followed a failed auction of Old Winstar's assets, counsel for the FCC took the position that a discontinuance of service could not occur without notice to affected customers and approval of a Section 214 application. *See* Exhibit 1, December 10th Hearing Transcript at pp. 46-48. In response to the FCC's remarks, the Court indicated that "the position offered by the FCC trumps everybody else's position, that is the 30-day notice." *Id.* at p. 53.

¹⁸ 47 U.S.C. § 258 and 47 C.F.R. § 64.1100-1120. *See* Sample Notice dated Feb. 24, 2002, submitted as part of Exhibit 10 of IDT's Emergency Petition.

¹⁹ *See In the Matter of Qwest Corp. and Winstar Communications, LLC, Adoption Letter for Previously Approved Interconnection Agreement*, Minn. Public Utilities Commission, PUC

under the existing interconnection agreement with “Winstar Communications, Inc.” (*i.e.*, Old Winstar) on a month-to-month basis, Qwest’s Wholesale Division processed the request for “Winstar Communications, LLC” as a routine opt-in request that was accepted and forwarded to counsel for filing with the Minnesota Public Utilities Commission.²⁰ At no time did IDT mention to Qwest that its company was not Old Winstar or, more importantly, that it was subject to certain Bankruptcy orders that dictated its obligations with respect to interconnection agreements.²¹ Shortly after filing a Joint Application for approval of its interconnection agreement with New Winstar, Qwest learned of New Winstar’s true status and sought to withdraw the Joint Application.²² Qwest is prepared to enter into a *bona fide* interconnection agreement with New Winstar, but not by circumventing the bankruptcy process.

C. Qwest’s Provision Of Services And Facilities To IDT

IDT has requested that Qwest “transfer” service previously provided under Old Winstar contracts to those Old Winstar subscribers IDT will keep. On April 16, 2002, IDT provided Qwest a letter with a list that “identifies circuits serving Old Winstar subscribers that are to be transferred to New Winstar”²³ All are services purchased through Qwest’s FCC Access Service Tariff. Qwest’s Tariff allows an assignment or a “transfer of the use” of service (without interruption of such service) from one customer to another “if the assignee or transferee assumes

Docket No. P421,5246/IC-02-324, Qwest’s Motion to Clarify or in the Alternative to Withdraw the Joint Application, and accompanying exhibits (“Motion to Withdraw Application”), including Affidavit of Larry Christensen (“Christensen Affidavit”), attached hereto as an attachment to Exhibit 2.

²⁰ Exhibit 2 at Christensen Affidavit ¶ 5.

²¹ *Id.* ¶¶ 7-8.

²² See Exhibit 2, Qwest’s Motion to Withdraw Application.

²³ See IDT’s letter from Geoffrey Rochwarger, COO, Winstar Holdings, LLC, to Qwest bankruptcy counsel, Andrew Sherman, dated Apr. 16, 2002 at 2, attached hereto as Exhibit 8.

all outstanding indebtedness for such services.”²⁴ Qwest is not asking IDT to assume all of Old Winstar’s service contracts, only those necessary to service the Old Winstar subscribers it wishes to keep. To date, IDT has not assumed any of Old Winstar’s service contracts.

If IDT does not wish to assume the balance due on Old Winstar’s existing service to its subscribers, IDT must place a new order for service in accordance with Qwest processes and subject to standard installment intervals and facility availability. Under the latter scenario, service provided under Old Winstar’s contracts would be discontinued so as not to accrue additional charges that will not be paid or assumed. Qwest has agreed to provide IDT three days’ notice before terminating service.²⁵

III. ARGUMENT

IDT has artfully maneuvered the bankruptcy rules and procedures balanced to protect the debtor’s estate and the creditors’ claims, not the interests of a solvent, financially healthy and informed buyer of the debtor’s assets. By playing the trump card of service interruption or disconnection -- which it created -- IDT is trying to effectively take over Old Winstar’s contracts without, to date, meeting the cure obligations that flow from those contracts, under bankruptcy law, the Bankruptcy Court’s Sales Order, and Qwest’s Tariff. It is IDT’s many efforts that have brought Old Winstar’s customers unnecessarily to the brink of having service disconnected. IDT has exercised its right to reject Old Winstar’s contracts, but has taken the law into its own hands by claiming the benefits of those contracts and attempting to prevent Qwest and the other service providers from lawfully terminating service without curing one penny of the outstanding contract debts. The law does not require, much less permit, this result.

²⁴ Qwest Corporation Access Service Tariff at Section 2.1.2.

²⁵ See Letter dated Apr. 25, 2002, from Andrew H. Sherman, Qwest bankruptcy counsel, to Michael R. Griffinger, IDT counsel, attached hereto as Exhibit 9.

A. Qwest Has Never Refused to Provide Communications Service upon Reasonable Request by IDT.

IDT accuses Qwest of failing to furnish communications service upon reasonable request as required under Section 201 of the Communications Act. Qwest is willing to provide IDT service. IDT's request for service, however, has not been reasonable. IDT's request for service ignores the controlling bankruptcy rules that dictate how it may continue to provide service under Old Winstar's contracts. IDT ignores Qwest's Tariff provisions setting forth the circumstances under which carriers in IDT's situation may continue to provide service under Old Winstar's contracts.²⁶ It ignores the FCC's rules intended to protect end users at risk of service disconnection. It is IDT's failure to adhere to the rules in place that unreasonably threatens to delay or deny service to Old Winstar's subscribers. Granting IDT's Petition would not merely be contrary to law, but would encourage the same kind of gamesmanship by IDT and perhaps other carriers in the future.

In its Petition, IDT discusses the steps required to disconnect service under Section 214 of the Communications Act and Part 63 of the FCC's rules to underscore the important public policy concern of the FCC to prevent a disruption of service without notice. The same concern is shared by private companies such as Qwest who are in the business of providing telecommunications services and in whose obvious interest it is to maintain service quality and customer satisfaction. IDT, keenly aware of this public policy concern, has wielded the threat of service interruption to avoid complying with the law. IDT did not provide notice to customers under Section 63.71 of the rules or submit a Section 214 application, even though it knew it

²⁶ Qwest's Tariffs have the force and effect of law. *See, e.g., American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (discussing filed-rate doctrine); *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (explaining that once approved by the FCC, the terms of the federal tariff are considered to be "the law").

would not assume Old Winstar's contracts and undertake the approach that prevents disruption in service. Consistent with its strategy to step into Old Winstar's contracts without payment of past debts as required under the Bankruptcy Code and Qwest's Tariff, IDT simply gave notice to Old Winstar's subscribers of a change of carrier. IDT does not and cannot claim that the latter notice satisfied its obligations to customers under the Commission's rules.

Disruption of service without notice to end users is not, moreover, the only public policy concern here. To condone IDT's conduct will have ramifications for the entire telecommunications industry. The bankruptcy rules are carefully balanced to protect the debtor's estate and to accommodate creditors' rights. The purchase of a debtor's assets benefits the debtor's estate, the creditors who have security interests that are therefore paid, and the creditors whose contracts are assumed and cured by the buyer. Should IDT prevail here, buyers of debtor's assets in the telecommunications industry will have no incentive to follow the bankruptcy rules requiring assumption and cure of service contracts they wish to keep. A decision favorable to IDT will nullify the bargained-for rights of service providers to terminate a contract and discontinue service for lack of payment. Buyers of telecommunications assets will know that as long as they fail to notify end users of a possible disruption in service, ILECs will be forced to continue to provide service under contracts which the buyers are refusing to assume and cure. The Commission should not permit such an unfair result.

B. IDT Is Gaining an Unfair Competitive Advantage
by Avoiding Its Obligation to Assume and Cure.

IDT charges Qwest and the other ILECs of trying to undermine competition by impeding CLECs' efforts to rehabilitate and reorganize their assets out of bankruptcy. This contention by IDT is particularly disingenuous. The bankruptcy proceedings here evolved from a Chapter 11 to a Chapter 7 liquidation. The CLEC debtor seeking bankruptcy protection, Old Winstar, did

not survive. IDT is a solvent, non-debtor third-party purchaser of assets whose own conduct to avoid the rules that everyone else is required to follow will allow it to gain an economic advantage over its competitors.

For instance, in the Chapter 11 bankruptcy of CLEC Rhythms Netconnections Inc., MCI WorldCom stepped in to purchase substantially all of the debtor's assets and, in accordance with the Bankruptcy Code, it selected which executory contracts with Qwest and other service providers it wished to reject as well as the contracts it wished to assume and cure.²⁷ With respect to those Qwest contracts for the provision of telephone services that WorldCom assumed and cured, service was transferred from Rhythms to WorldCom without disruption.

Likewise, the Chapter 11 bankruptcy of CLEC Northpoint Communications Group, Inc. involved the sale of substantially all of Northpoint's assets to third-party purchaser AT&T.²⁸ In accordance with the Bankruptcy Code, AT&T assumed and cured certain executory contracts. With respect to Qwest contracts assumed by AT&T, service was transferred without interruption.

WorldCom, AT&T and the other service providers acquiring assets out of bankruptcy follow the rules and pay the outstanding balances on contracts they wish to assume in order to provide service pursuant to those contracts. IDT's purchase of Old Winstar's assets is no different. IDT admitted to the Bankruptcy Court at the hearing in which the Court approved the sale, that it was required to cure the past debts on the lines it wished to keep. IDT, unlike its competitors WorldCom and AT&T, is attempting to avoid its obligation to cure outstanding

²⁷ See *In re Rhythms Netconnections Inc., et al., Debtors*, United States Bankruptcy Court, Southern District of New York, Chapter 11 Case Nos. 01-14283 through 01-14287 (BRL), Stipulation and Order Approving Terms of Assumption and Rejection of Agreements with Certain Incumbent Local Exchange Carriers, attached hereto as Exhibit 10.

²⁸ See *In re Northpoint Communications Group, Inc., et al., Debtors*, United States Bankruptcy Court, Northern District of California, San Francisco Division, Case No. 01-30127, Order Under

balances on contracts it wishes to adopt. If IDT's strategy succeeds, its undeserved savings will unfairly disadvantage its competitors.

C. Qwest's Adherence to Its Tariff and Policies Is Intended to Treat Competitors on Nondiscriminatory Terms.

IDT contends that Qwest is violating Sections 202 and 251 of the Communications Act by seeking to impose unreasonable and discriminatory terms and conditions upon IDT. The reverse situation is true. Qwest is simply treating IDT as it would any other wholesale provider seeking to purchase telecommunications services. Had Qwest treated IDT any differently than WorldCom and AT&T, it would have been subject to claims of discrimination by those carriers. Stated another way, IDT's complaints stem from Qwest's failure to extend to IDT preferential treatment under its Tariff and policies. Qwest's Tariff requires a customer who wants to assume or transfer service from a prior customer to cure that prior customer's outstanding balance. Alternatively, Qwest's procedures require a disconnection of prior service where a new customer seeks to order the same line of service without a transfer. IDT does not want to be treated as a provider in either category. Instead, it wants Qwest to carve out an exception for IDT that allows it to transfer Old Winstar's subscribers without curing the balance owed for the service.

IDT complains of disparate treatment noting that facilities and services of other providers are transferred under new ownership without a disruption in service. But the other providers to whom IDT is referring, unlike IDT itself, assumed and cured breaches of contracts in order to continue to provide service to the customers covered by those contracts. IDT is thus not "similarly situated to these other providers." The Rhythms and Northpoint bankruptcies are good examples. With respect to service provided under contracts that WorldCom and AT&T

11 U.S.C. §§ 105, 363, 365 and 1146(c) Approving (among other things) Assumption and Assignment of Executory Contracts, attached hereto as Exhibit 11.

assumed, Qwest service was transferred without disruption. IDT simply refused to comply with the law and act in the same manner as its competitors.

The Rhythms and Northpoint bankruptcies are different in other notable respects. Rhythms and Northpoint were forthright with their subscribers about the possible discontinuance of service. Both notified end users of this eventuality under Section 63.71 shortly after filing for bankruptcy.²⁹ IDT wishes to be rewarded and afforded special accommodation for not providing notice to end users of the possible disruption of service caused by its high-risk legal strategy to ignore and resist the bankruptcy rules.

D. Qwest Cannot Be in Violation of Section 203
for Insisting on Adherence to Its Tariff.

Contrary to IDT's claim, Qwest's refusal to afford IDT preferential treatment is required by, not violative of, Qwest's Tariff. To be clear, Qwest's position is that IDT must assume and cure the Old Winstar contracts it does not reject. Otherwise, IDT must start anew under Qwest's FCC Access Service Tariff. Qwest's Tariff allows an assumption or "transfer of use" from an existing customer if the assignee or transferee "assumes all outstanding indebtedness."³⁰ Absent an assignment, IDT may place a new order for access circuits under the terms and prices listed individually in the Tariff. Qwest is willing to provide service to IDT on the same terms under which it provides service to its other wholesale customers.

²⁹ See *In the Matter of Rhythms Links Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services*, 16 FCC Rcd 17024. Contrasted with Old Winstar and IDT, on August 2, 2001, Rhythms filed for Chapter 11 bankruptcy, and on August 9, 2001, it sent overnight notice to its affected customers of its intent to discontinue service if reorganization were not possible. See also, *Requirements for Carriers to Obtain Authority Before Discontinuing Service in Emergencies and Northpoint Communications, Inc. Authority to Discontinue Service*, 16 FCC Rcd 10924.

³⁰ Qwest's FCC Tariff at Section 2.1.2.

IV. CONCLUSION

The Commission should not allow IDT to ignore the bankruptcy rules and to coerce Qwest and the other service providers into provisioning continuous, unconditional service under terms of its choosing for as long as it decides not to notify Old Winstar end users of a possible disruption in service. IDT's Petition should be denied.

Respectfully submitted,

QWEST CORPORATION

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April 29, 2002

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION IN RESPONSE TO THE EMEGENCY PETITION FOR DECLARATORY RULING OF WINSTAR COMMUNICATIONS, LLC** to be filed with the FCC via its Electronic Comment Filing System, and a copy of the **COMMENTS** to be served, via email, on the parties listed below.*

Richard Grozier
Richard Grozier

April 29, 2002

Federal Communications Commission

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